IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

TATI ABU KING, et al., Plaintiffs, v. JOHN O'BANNON, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION
TO EXCLUDE THE TESTIMONY OF PROFESSOR CARISSA BYRNE HESSICK

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INTRODUCTION

Professor Hessick has submitted a legal brief labeled as an expert report. Her opinion primarily consists of two legal conclusions. First, she offers her interpretation of the statutory phrase "felonies at common law" as used in the Virginia Readmission Act. Second, she categorizes present-day felonies under Virginia law as either falling within or outside the scope of her interpretation of the Readmission Act. Additionally, she opines that "felony" in the 1869 Virginia Constitution would have been understood by the 41st Congress to mean "felony at common law." These are purely legal conclusions, and they are inadmissible under Federal Rule of Evidence 702.

It is hardly surprising that Professor Hessick's opinions are legal conclusions. She is, after all, a law professor. Indeed, given her educational background, career experience, and scholarship, she would not be qualified to offer an expert opinion on anything *other than* the law. Thus, to the extent Professor Hessick attempts to recharacterize her analysis as something other than legal research, it is equally inadmissible.

Even if Professor Hessick were not opining on purely legal questions, her methodology is so unreliable, in both theory and practice, that it is still inadmissible under Rule 702. In theory, Professor Hessick's methodology turns on vague distinctions—such as the difference between a modern-day felony that "exceeds the boundary of" a common law felony and one that "substantially" exceeds the boundary of a common law felony. In practice, Professor Hessick fails to offer any basis for the classifications she has made. For example, at her deposition, Professor Hessick was unable to explain precisely how she classified modern-day felonies under the common law. A supposed expert's *ipse dixit* does not constitute admissible expert opinion.

Finally, the unreliability of Professor Hessick's opinions is underscored by her inexplicable omission of material that contradicts her opinion—material that she admitted she reviewed in preparing her report. Indeed, Professor Hessick cites the very page of a treatise (one she describes

as particularly influential in the mid-19th century) that explains the term "felony" in Virginia included not only common-law felonies, but all crimes labeled a felony by statute, and crimes punishable by death or confinement in the penitentiary. Based on that treatise's understanding, the word "felony" in Virginia's 1869 Constitution—which was approved by Congress in the Readmission Act—indisputably disenfranchised individuals convicted of *all* felonies, thus confirming that Defendants are entitled to summary judgment. Professor Hessick's omission of this material from her opinion demonstrates that she is serving as a legal advocate, not a dispassionate expert witness. The Court should exclude her opinion entirely.

RELEVANT BACKGROUND

Through the Virginia Readmission Act of 1870, Congress approved Virginia's 1869 Constitution as "republican." An Act To Admit the State of Virginia to Representation in the Congress of the United States, 1870, ch. 10, 16 Stat. 62. At the same time, Congress prohibited Virginia from amending its Constitution to disenfranchise any class of persons not already disenfranchised, unless for crimes that were felonies at common law. *Id.* at 16 Stat. 63. The 1869 Virginia Constitution that Congress approved *already* disenfranchised anyone convicted of any "felony"—including statutory felonies that were not felonies at common law. *See* VA. CONST. art. III, § 1 (1869). Virginia continues to disenfranchise felons in its current Constitution. *See* VA. CONST. art. II, § 1 (1971).

Plaintiffs contend that Virginia is violating the Readmission Act. *See* Pls.' Opp. to Defs.' Mot. to Dismiss, ECF No. 78 at 10-14 (Oct. 26, 2023). In their view, the Readmission Act permits the Commonwealth to disenfranchise *only* those convicted of crimes that would have been understood as felonies at common law in 1870. *Id.* at 11-12. On Plaintiffs' theory, if a present-day felony would not have been understood as a felony at common law in 1870, Virginia may not disenfranchise an individual convicted of that felony. *Id.*

In support of their argument, Plaintiffs have served an expert report by law professor Carissa Byrne Hessick. *See* Report of Prof. Hessick ("Hessick Report") (attached hereto as Exhibit 1). Professor Hessick's report primarily consists of two opinions. First, she opines on the specific crimes that, she says, the Members of Congress who passed the Readmission Act in 1870 would have understood as "felonies at common law." *Id.* ¶¶ 8-9. Second, she purports to catalog all present-day felonies under Virginia law and then categorize them as either falling within or outside the scope of common law felonies she identified, reporting her results in three separate spreadsheets attached to her report. *See id.* ¶¶ 39-40, Exs. D, E, and F. Additionally, she asserts that members of Congress "would have interpreted the reference to 'felony'" in Virginia's 1869 Constitution "to mean a felony at common law." *Id.* ¶ 15. Defendants move to exclude Professor Hessick's opinion entirely under Federal Rule of Evidence 702.

LEGAL STANDARD

Federal Rule of Evidence 702 "imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable." *Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017). "Specifically, district courts must ensure that an expert's opinion is 'based on scientific, technical, or other specialized knowledge and not on belief or speculation.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999) (emphasis omitted)). "The burden of establishing the reliability of expert testimony is on the proponent." *Synopsys, Inc. v. Risk Based Sec., Inc.*, No. 3:21-cv-252, 2022 WL 3005990, at *4 (E.D. Va. July 28, 2022) (Gibney, J.) (cleaned up). Although the Rule 702 standard is relaxed for a bench trial, "Rule 702 applies whether the trier of fact is a judge or a jury." *Id.* at *5 (internal quotations omitted).

ARGUMENT

I. Professor Hessick's legal opinions are not admissible as expert testimony.

Under Rule 702, expert testimony must be "helpful" to the factfinder "in understanding the evidence or determining a fact at issue." *Sardis*, 10 F.4th at 281. "Testimony that merely states a legal conclusion as to the meaning or application of a rule or statutes is not 'helpful' as required by Rule 702." *United States v. Cortez*, 205 F. Supp. 3d 768, 776 (E.D. Va. 2016). Because "the only legal expert in a federal courtroom is the judge," the "meaning of a statute and regulations is a subject for the court, not for testimonial experts." *Id.* (brackets and internal quotations omitted). As this Court has recognized, purported expert testimony that "conveys improper legal conclusions" is testimony that "does not aid the Court as the fact-finder." *Synospsys, Inc.*, 2022 WL 3005990, at *5. Therefore, expert "testimony that states a legal standard or draws a legal conclusion by applying law to the facts is generally inadmissible." *United States v. McIver*, 470 F.3d 550, 561-62 (4th Cir. 2006).

Here, Professor Hessick's opinion consists of three legal conclusions. First, Professor Hessick opines on the understanding of the phrase "felonies at common law" in the Virginia Readmission Act. Hessick Report ¶¶ 8-9. Second, Professor Hessick purports to categorize present-day felonies under Virginia law as falling either "within the scope of" the common law felonies she identified or "substantially exceed[ing] the boundary of the common law felonies" she identified. *Id.* ¶¶ 39-40. Additionally, Professor Hessick asserts that "felony" in the 1869 Virginia Constitution would have been understood by the 41st Congress to "mean a felony at common law, rather than any crime that had been deemed a felony by the Virginia legislature." *Id.* ¶ 15.

On their face, these opinions are on pure questions of law. As a law professor whose educational and professional background focuses exclusively on the law, it is unsurprising that

Professor Hessick submitted a report that offers only opinions on the law. Indeed, based on the information Plaintiffs have provided, Professor Hessick would not be qualified to offer an expert opinion on anything *other than* the law. Because the only opinions Professor Hessick offers—and is qualified to offer—are legal opinions, the Court should exclude them under Rule 702.

A. Professor Hessick's analysis of the common law is an inadmissible legal conclusion.

Professor Hessick's interpretation of the "felonies at common law" in the Readmission Act is an opinion on a pure question of law. In the first half of Professor Hessick's report, she (in her words) "analyzed how Congress would have understood the phrase 'felonies at common law' when it readmitted Virginia to representation in the United States Congress in 1870 following the Civil War." *Id.* ¶ 8. Indeed, Professor Hessick begins this analysis by providing a block quote of "[t]he relevant text of the Virginia Readmission Act." *Id.* ¶ 17. Professor Hessick then spends pages analyzing statutes, caselaw, legal treatises, legal dictionaries, and law review articles to provide her opinion as to how the phrase "felonies at common law" in the Readmission Act would have been understood at the time. *See id.* ¶¶ 17-36 & nn. 14-87.

This is pure legal analysis, not admissible expert opinion. "Simply put, an expert telling a judge how to interpret a rule or statute does nothing more than give an attorney a redundant means of presenting legal argument to the Court." *Cortez*, 205 F. Supp. 3d at 776. Plaintiffs' counsel may make their "arguments through [their] briefs or oral argument." *Id.* But here, Plaintiffs have submitted what amounts to a full-blown legal brief under the guise of an expert report. Rule 702 does not allow that maneuver.

Nor does Professor Hessick's legal reasoning transform into expert opinion merely because it includes a historical analysis of the law. As the Supreme Court has explained, courts frequently engage in a "'legal inquiry'" that "'is a refined subset' of a broader historical inquiry.'" *N.Y. State*

Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 25 n.6 (2022) (quoting William Baude & Stephen E. Sachs, Originalism and the Law of the Past, 37 L. & HIST. REV. 809, 810-811 (2019)). Understanding old laws and applying them to modern facts is "the bread-and-butter of ordinary legal reasoning." Baude & Sachs, *supra*, at 818. And expert witnesses have no role in interpreting the law.

A case from this district is on point. In *SunTrust Banks*, a party intended to offer an attorney's "opinions regarding the legal history of Virginia's trust law as it pertains to the personal liability of trustees." *SunTrust Banks, Inc. v. Robertson*, No. 2:09-cv-197, 2010 WL 11566593, at *5 (E.D. Va. Aug. 12, 2010). The court concluded that this "proposed testimony is inadmissible." *Id.* at *6. As the court explained, "[e]xperts interpret and analyze factual evidence"; "'[t]hey do not testify about the law because the judge's special legal knowledge is presumed to be sufficient[.]'" *Id.* (quoting *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999)). "Counsel for the parties may argue the history and application of the law in oral argument," the Court continued, "and the Court will make an appropriate determination regarding the application of the law." *Id.* And although the proponents in that case "argue[d] that instruction on legal history is different than instruction on the current state of the law," this was "a hollow distinction" because the "apparent purpose" of the testimony was "to assist the Court in determining what law to apply to the issues raised in the instant action," which "duplicates the judge's role in the case." *Id.*

That the Court is the factfinder here does not change the result. As *SunTrust* explained, even in a bench trial, "such expert legal testimony remains problematic because it opens the door for 'legal experts' to usurp the role of trial counsel and the judge and because it is simply unnecessary." *Id. Cortez* confirms that, "'even during a bench trial there seems no compelling reason to allow live testimony by conflicting experts on the law, as written briefs, supplemented

by oral argument by counsel if appropriate, will serve the same function.'" 205 F. Supp. 3d at 776 (quoting *The New Wigmore: A Treatise on Evidence: Expert Evidence* § 2.3 (brackets omitted)). This Court has similarly excluded purported expert testimony that "conveys improper legal conclusions" in a bench trial, because an expert's legal conclusion "does not aid the Court as the fact-finder." *Synospsys, Inc.*, 2022 WL 3005990, at *5; *see also Synopsys, Inc. v. Risk Based Sec., Inc.*, 70 F.4th 759, 774 (4th Cir. 2023) (affirming this Court's decision and "agree[ing]" that the expert's "legal conclusions" and other errors "plagued his assessment").

In sum, Plaintiffs cannot smuggle legal opinions into the record—or gain additional briefing space for legal arguments—under the guise of expert testimony. Professor Hessick's report is indistinguishable from a legal brief. She analyzes cases, statutes, dictionaries, and treatises to determine the meaning of a statutory phrase. That analysis is not admissible expert testimony, and the Court should exclude it.

B. Professor Hessick's classification of Virginia statutes as falling within the meaning of "felonies at common law" in the Readmission Act is an inadmissible legal opinion.

Professor Hessick's legal analysis did not stop at construing the phrase "felonies at common law" in the Readmission Act. Instead, she proceeded to purportedly catalog all current felonies under Virginia law and then categorize those present-day felonies as either "qualify[ing] as 'felonies at common law' as the term was used in the Virginia Readmission Act" or not qualifying. Hessick Report ¶ 11. In other words, Professor Hessick interpreted a statutory phrase and then determined whether existing statutes fall within the meaning of that statutory phrase.

This analysis is as legal as it gets. Indeed, courts routinely exclude expert testimony that purports to apply law *to facts*. *See, e.g.*, *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986), *abrogated on other grounds by Printer v. Dahl*, 486 U.S. 622 (1988) (affirming exclusion of expert called "to testify in substantial part to the meaning and applicability

of the securities laws to the transactions here"); *The Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC*, No. 3:09-cv-358, 2010 WL 2653373, at *5 (E.D. Va. July 2, 2010) (excluding expert testimony opining that architectural drawings did not satisfy the statutory phrase because it constituted "interpretation and application of the statute"); *Cortez*, 205 F. Supp. 3d at 776 (excluding expert testimony that "would comprise an attorney-witness's conclusion on whether the facts at bar presented a conflict under the Virginia Rules of Professional Conduct"); *Newkirk v. Enzor*, No. 2:-13-1634-RMG, 2017 WL 823553, at *6 (D.S.C. 2017) (excluding expert testimony that "cites and quotes South Carolina statutes and applies the law to the facts of the case to reach ultimate legal conclusions regarding Plaintiffs' claims"). Here, Professor Hessick goes one further and applies law *to law*. Her analysis is thus inadmissible twice over.

C. Professor Hessick is not qualified to offer any expert opinion other than a legal one.

During her deposition, Professor Hessick attempted to avoid the obvious conclusion that she was offering a legal opinion. For example, Professor Hessick sought to distinguish between "interpreting" the Readmission Act in the "colloquial" sense and interpreting the Act "in a technical sense." Dep. Transcript of Prof. Hessick at 152:12-22 ("Hessick Tr.") (attached hereto as Exhibit 2). Interpreting the Act "in a technical legal sense," according to Professor Hessick, "is something that courts do." *Id.* at 152:20-22. She, in contrast, purports to interpret the Act in the "colloquial" sense, which is to ask, in her words, "what meaning do you give to it or how do you understand it?" *Id.* at 152:14-19. Therefore, Professor Hessick says, she is "not providing a legal interpretation," but rather "providing an expert opinion about how members of Congress would have understood the phrase." *Id.* at 153:3-6.

There are several problems with Professor Hessick's illusory distinction between "technical" and "colloquial" interpretation. First, to the extent she is providing an opinion "about

how members of Congress would have understood the phrase," Professor Hessick is purporting to provide a historical opinion that she is not qualified to give. Professor Hessick is a law professor, not a history professor, and the only type of history she is qualified as an expert to do is the type of history *lawyers* do. *See supra*, p.5. Second, Professor Hessick's definition of her "colloquial" interpretation—asking "what meaning do you give to it or how do you understand it," Hessick Tr. 152:18-19—is essentially the definition of statutory interpretation. *See New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." (cleaned up)). Whatever the distinction between "technical" and "colloquial" interpretation, it does not make Professor Hessick's legal opinions admissible under Rule 702.

At her deposition, Professor Hessick suggested she also might be seen as a historical expert. Specifically, Professor Hessick was asked to name the expertise on which her testimony was based. Hessick Tr. at 13:13-14:1. In response, she listed her "years of study of the history of criminal law, and the structure of criminal law, and the cultural context surrounding criminal law." *Id.* at 14:2-5. When asked if she had any expertise beyond "criminal law," Professor Hessick stated that "history of criminal law" is "different than criminal law." *Id.* at 15:10-12. But Professor Hessick has no background as a historian. She does not even have a history degree. *Id.* at 15:13-14. Instead, Professor Hessick had it right when she testified that she has significant expertise in various aspects of *criminal law*. The problem for Plaintiffs under Rule 702 is that she has no qualifications to opine on anything *apart from* criminal law. Professor Hessick's pivot to being a historical expert thus fails, and her opinion should be excluded entirely as an improper conclusion on a pure question of law.

II. Professor Hessick's purported methodology is amorphous and unreliable.

In both theory and practice, Professor Hessick's methodology is unreliable. Indeed, even she struggled to use it to classify modern felonies. Moreover, she has failed to explain precisely how she reached her conclusions; the Court is asked to simply take her word for it. Finally, the unreliability of Professor Hessick's report is most starkly demonstrated in her omission of material that directly contradicts her opinion. Professor Hessick admits she read this material while preparing her report; in fact, she quotes *from the same page*. But she does not mention it in her report. That omission undermines her credibility as an expert witness and confirms that her methodology cannot be trusted.

A. Professor Hessick's methodology amounts to unverifiable *ipse dixit.*

As this Court has explained, *Daubert* provides four "'guideposts'" to aid in assessing whether an expert's opinion is reliable: (1) whether the expert's method "'can be (and has been) tested'"; (2) whether the expert's method "'has been subjected to peer review and publication'"; (3) "'the known or potential rate of error' inherent in the expert's theory or technique"; and (4) "whether the expert's methodology is generally accepted in [the] field of expertise." *Synopsys, Inc.*, 2022 WL 3005990 at *5 (quoting *Nease*, 848 F.3d at 229). A "'lack of testing'" of an expert's opinion is "an 'especially important factor for guiding a court in its reliability determination.'" *Id.* (quoting *Sardis*, 10 F.4th at 290). "For the proffered evidence to be sufficiently reliable it must be derived using scientific or other valid methods and not based on mere belief or speculation." *Rich ex rel. C.W. v. Dennison Plumbing & Heating*, No. 1:23-cv-705-SAG, 2025 WL 43181, at *3 (D. Md. Jan. 7, 2025) (internal quotations omitted). "[A]n expert opinion that relies on 'assumptions which are speculative and are not supported by the record,' is inadmissible." *Id.* (quoting *Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994)).

As an initial matter, even Professor Hessick's own description of her methodology shows that it is unreliable. Her report states that she determined which "current statutory felonies are substantially similar to or fall comfortably within the scope of one of the fifteen common law felonies" she contends Congress would have understood to fall within the phrase "felony at common law" in 1870. Hessick Report ¶ 39. She then determined which statutory felonies "substantially exceed the boundary of the common law felonies" she identified. *Id.* ¶ 40. Finally, she did not classify felonies that "overlapped only in part with one of the fifteen common law felonies." *Id.* ¶ 41. These standards—"substantially similar," "fall[ing] comfortably within," "substantially exceed[ing] the boundary," and "overlapp[ing] only in part"—are standards that Professor Hessick made up specifically for this case and appear nowhere in any of her (or anyone else's) academic literature. Moreover, Professor Hessick made different classifications based on whether a modern-day felony "substantially" exceeded the boundary of common-law felony or instead exceeded it but not "substantially" so. Hessick Tr. at 68:16-21. There is no way to verify whether a modern-day felony "substantially" exceeds the scope of a common-law felony other than Professor Hessick's own say-so. *Brasko v. First Nat'l Bank of Pa.*, 700 F. Supp. 3d 354, 366 (D. Md. 2023) (holding that an expert's "'because I say so' approach does not meet the requirements of a reliable methodology").

Moreover, this exercise—classifying modern-day crimes as felonies at common law—is not something Professor Hessick regularly conducts. When asked if she had ever published an analysis like the one she performed in her expert report, she could point only to two blog posts. Hessick Tr. at 32:8-21, 33:4-21. Even a cursory glance at these posts shows they are nothing like the analysis Professor Hessick purports to perform here. *See* Carissa Byrne Hessick, *Bribery, Impeachment, and the Common Law*, PRAWFSBLAWG (Nov. 21, 2019), https://perma.cc/UT9Y-

E9BZ (blog post interpreting the word "bribery" in the federal Constitution in light of common-law bribery but concluding "it's not entirely clear cut"); Carissa Byrne Hessick, *Felony Murder and the Storming of the Capitol*, Lawfare (Jan. 14, 2021), https://perma.cc/NWY7-KE3G (blog post analyzing whether January 6 rioters could be subject to felony-murder charges under federal law). Therefore, this methodology of cataloging modern-day crimes and classifying them as felonies at common law is something Professor Hessick is attempting for the first time in this case.

This methodology is so indeterminate that Professor Hessick cannot even apply it herself. Although she sets out to determine "how Congress would have understood the phrase 'felonies at common law'" applied to various crimes, Professor Hessick admits that she could not confidently determine that category of crimes. *See* Hessick Report ¶¶ 8, 24 (noting "there was less consensus regarding which crimes were appropriately deemed common law felonies"); *id.* ¶ 35 ("I am uncertain about whether the four crimes identified in the previous paragraph would have been considered felonies at common law in 1870[.]"); *id.* ¶ 33 (including crimes understood as treason as common law felonies "out of an abundance of caution"). Similarly, Professor Hessick sought to determine "which of Virginia's current statutory felonies" would "qualify as 'felonies at common law' as the term was used in the Virginia Readmission Act." *Id.* ¶ 11. But she again could not do so. *Id.* ¶ 41 ("I was unable to definitively classify 238 current Virginia statutory felonies as either falling within the phrase 'felonies at common law' as the term was used in the Virginia Readmission Act or falling outside of the phrase.").

Indeed, Professor Hessick could not even explain the source from which she derived half of her analysis. Specifically, her report states that, "[t]o identify the felonies under Virginia's current criminal code," she "analyzed the Virginia Criminal Sentencing Commission's 2024 Virginia Crime Codes, or VCC, index," which (she says) "reflects not only individual criminal

statutes which charge felonies, but crimes that are punishable as felonies based on the type of offense." *Id.* ¶ 38. At her deposition, Professor Hessick could not explain what this source is or how it works:

> Q. Returning to your report, which is Exhibit 1, I'd like to go to – it's page 21 in the report, paragraph 38. And you mentioned the Virginia Criminal Sentencing Commission's 2024 Virginia Crimes Code Index. Do you see that?
>
> A. Paragraph 38 on page 21. Yes. I see it.
>
> Q. And can you explain what that is?
>
> A. No.

Hessick Tr. at 50:13-20. Thus, Professor Hessick was unable to explain the source from which she apparently derived the data forming the foundation of her analysis.

Yet Professor Hessick purports to classify every single present-day felony under Virginia law in a series of spreadsheets. Specifically, Exhibit D to her report lists felonies that, she says, would have been understood as felonies at common law in 1870; Exhibit E lists felonies that would *not* have been understood as felonies at common law in 1870; and Exhibit F lists felonies that she could not classify one way or the other.

Precisely *how* did Professor Hessick classify the modern-day felonies between these categories? Not even she can say. At her deposition, Professor Hessick was presented with Va. Code § 18.2-152.14, entitled "Computer as Instrument of Forgery." Hessick Tr. at 101:17-22. In her report, Professor Hessick lists this statute in *all three* spreadsheets: Exhibit D (at 5), Exhibit E (at 7), and Exhibit F (at 1). Professor Hessick was asked how one would go about analyzing this statute under her methodology. Hessick Tr. at 103:7-10. Ultimately, Professor Hessick explained: "I don't think that I can recreate it for you right now without spending some time looking up this statute and going back into the historical sources[.]" *Id.* at 107:11-14. She was therefore asked, "is

there anywhere in your report where I can see the analysis you did with respect to this particular statute apart from the listing of it in the exhibits?" *Id.* at 108:4-7. "No," she answered, because she "didn't provide individualized information about those statutes in the report." *Id.* at 108:13-16. In other words, we must take Professor Hessick's word for it.

Ultimately, any attempt to understand, replicate, or assess Professor Hessick's classification of modern-day felonies collapses into simply resting on Professor Hessick's say-so. "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137 (1997). Professor Hessick's methodology is unreliable in both theory and practice. And neither her report nor her deposition testimony explains how she reached her conclusions. If Professor Hessick's testimony is not excluded in full, the Court should at the very least exclude her haphazard classification of modern-day felonies.

B. Professor Hessick's unexplained omission of material contrary to her opinion that she admittedly reviewed undermines the reliability of her conclusions.

"[F]ailing to adequately account for contrary evidence is not reliable or scientifically sound." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 932 (D.S.C. 2016); *see also McEwen v. Baltimore Wash. Med. Ctr. Inc.*, 404 F. App'x 789, 791-92 (4th Cir. 2010) (upholding exclusion of expert testimony where experts "failed to meaningfully account for . . . literature at odds with their testimony"). Professor Hessick demonstrably—and admittedly—ignored material that was directly contrary to portions of her opinion. This failure underscores that Professor Hessick is serving as a legal advocate, not an expert witness.

To appreciate the significance of this omission, it is necessary to briefly recall the nature of Plaintiffs' argument here. *See supra*, p.2-3. Although Virginia's 1869 Constitution, which was

approved by Congress, disenfranchised anyone convicted of any "felony," Plaintiffs contend that Virginia could only disenfranchise *common law* felons under that provision. Professor Hessick offers a conclusory assertion—supported by no citation of authority—that "Members of Congress" in 1870 "likely would have interpreted the reference to 'felony'" in the 1869 Virginia Constitution "to mean a felony at common law, rather than any crime that had been deemed a felony by the Virginia legislature." Hessick Report ¶ 15.

But one of the leading sources Professor Hessick relies upon directly contradicts her assertion. In her analysis of the common law, Professor Hessick relies extensively on the 6th edition of Wharton's treatise on criminal law, published in 1868. *See id.* ¶¶ 13, 20, 22, 27-33 and accompanying footnotes. Indeed, she describes "Wharton's 1868 Treatise on Criminal Law" as "one of the leading contemporaneous sources on the common law as it was understood in the mid-nineteenth century." *Id.* ¶ 22. In her report, Professor Hessick quotes § 2 of Volume 1 of Wharton's treatise for the proposition that there was a distinction between common law felonies and statutory felonies. *See id.* ¶ 20 n.19 ("'In this country, with a few exceptions, the common law classification has obtained; the principal felonies being received as they originally existed, and their number being increased as the exigencies of society prompted.'" (citation omitted)).

On *the very same page* where that quote appears, however, Wharton explains that the understanding of a "felony" *in Virginia* included both common law and statutory felonies. *See* Hessick Ex. 9 (July 3, 2025) (attached hereto as Exhibit 3). Indeed, Wharton does so just *two sentences after* the material quoted by Professor Hessick:

> In this country, with a few exceptions, the common law classification has obtained; the principal felonies being received as they originally existed, and their number being increased as the exigencies of society prompted. In New York, however, felony, by the revised statutes is construed to mean an offence for which the offender, upon conviction, shall be liable by law to be punished by

> death, or by imprisonment in a state prison. *And in Virginia it comprehends all offences, below treason, which occasioned a forfeiture of property at common law, all so denominated by statutes, and all to which statutes have annexed capital punishment or confinement in the penitentiary, excepting those which, though subjected to the latter punishment, are or may be declared misdemeanors by the statutes creating them*.

Id. at 4 (emphasis added). According to Wharton, then, the understanding of the word "felony" in Virginia at the time encompassed three separate categories: (1) "all offences, below treason, which occasioned a forfeiture of property at common law," (2) "all [offences] so denominated [as a felony] by statutes," and (3) "all [offences] to which statutes have annexed capital punishment or confinement in the penitentiary," unless the offences punishable by confinement in the penitentiary were "declared misdemeanors by the statutes creating them." *Id.* Thus, this Wharton passage confirms that the word "felony" in Virginia's 1869 Constitution (which was approved by Congress) was best understood to result in disenfranchisement for *all felonies*, not just common law felonies. In other words, Defendants' legal argument is correct, and they are entitled to summary judgment.

At her deposition, Professor Hessick *admitted* that she read this passage when preparing her report:

> Q. Do you recall reading this when you were preparing your report?
>
> A. I do.
>
> Q. Can you recall this particular passage about Virginia when preparing your report?
>
> A. So I recall that it said that Virginia took a different approach than other states.

Hessick Tr. at 129:11-17. Her failure to mention, let alone engage with, this material fatally undermines the credibility of her expert opinion. *In re Lipitor*, 174 F. Supp. 3d at 932 ("[F]ailing to adequately account for contrary evidence is not reliable or scientifically sound."). Professor

Hessick's report and deposition testimony confirm that she is serving as a legal advocate, not an expert witness. On this basis alone, the Court should exclude Professor Hessick's opinion.

CONCLUSION

For these reasons, the Court should exclude Professor Hessick's opinion.

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Respectfully submitted,

JOHN O'BANNON
ROSALYN R. DANCE
GEORGIA ALVIS-LONG
CHRISTOPHER P. STOLLE
J. CHAPMAN PETERSEN
SUSAN BEALS
ERIC SPICER
SANDY C. ELSWICK

By: */s/ Thomas J. Sanford*
Thomas J. Sanford (VSB #95965)
Deputy Attorney General

Jason S. Miyares
Attorney General
Erika L. Maley (VSB #97533)
Solicitor General
Kevin M. Gallagher (VSB #87548)
Principal Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

Charles J. Cooper *(Pro Hac Vice)*
John D. Ramer *(Pro Hac Vice)*
Haley N. Proctor (VSB #84272)
Bradley L. Larson *(Pro Hac Vice)**
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com

*Not a D.C. Bar Member; practice limited to matters in federal forums.

Counsel for Defendants

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on July 18, 2025, the foregoing memorandum was electronically transmitted to all counsel of record in this matter.

/s/ Thomas J. Sanford
Thomas J. Sanford (VSB #95965)
Deputy Attorney General